Supreme Court, U.S.
FILED
99 892 NOV 24 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ELLEN MANNATT,
ROBERT MANNATT,
BRUCE MATHER,

Petitioners

v.

UNITED STATES OF AMERICA,
FORT INDEPENDENCE INDIAN RESERVATION,
DANIEL MILLER JR.,
ALLEN WILDER,
DANIEL MILLER SR., Tribal Chairman,
and DANIEL MILLER SR., an individual.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth District

PETITION FOR WRIT OF CERTIORARI

KIRK K. LIVERMONT
Counsel of Record
LAW OFFICE OF
KIRK K. LIVERMONT
251 NORTH EDWARDS STREET
(POST OFFICE BOX 6)
INDEPENDENCE, CA 93526
(760) 878-2401

ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

Petitioners brought this action to enforce property rights. Initially, there were two distinct issues: boundary lines and water rights.

Water rights and/or access to water issues are now being litigated in California state court.

The underlying action now before this Court relates to boundary line disputes, claims for inverse condemnation, and Writ of Mandamus. The Writ of Mandamus is for an order to compel the Bureau of Land Management to perform another survey in conformance with statutes and published procedure.

The inverse condemnation claims relate to the taking of Petitioners' land if either a new survey is not ordered or if this Court rules there is no jurisdiction to litigate the boundary line dispute.

From a pragmatic viewpoint there are three types of land under consideration in this action. The first is land included as part of the Fort Independence Indian Reservation when it was created in 1915. The second is land that is clearly private property when one lot was part of a patented land grant in 1885 and the other lot removed from the reservation by patent in 1923. The third type of land is "no man's land"; land that used to be considered private property prior to unilateral acts of reservation members and a re-survey by Bureau of Land Management, which the United States now asserts is Indian trust land.

There is no question that title to the first land belongs to the United States and is being held for Indian use. Nor the second land, as title is clearly in the names of the Petitioners. Title to "no man's land" is disputed. The United States attorney, without either Congressional or Executive action, unilaterally asserted that this "no man's land" is Indian Trust Land and that said assertion is not subject to this Court's review.

There are two sides to every boundary line. In this case

one is Indian land and the other is private property. The underlying action is to determine the extent of that private property and to finally establish a boundary line between the two.

The United States' position is that it can re-survey this land whenever it wants and adjust the boundaries without any recourse by adjoining landowners. Such a proposition is certainly not valid in this country.

Petitioners' contention is that the United States District Court has the jurisdiction to define existing boundary lines and to validate a resurvey affecting them.

Therefore, the primary issue in this appeal is determining if a United States District Court has the jurisdiction to determine the boundary line between land held in trust by the United States as an Indian reservation and adjacent private property. The sub-issues include:

1. May members of an Indian Tribe unilaterally alter an historic boundary line by removing an existing fence and erecting a new fence on land that was formerly private property?

2. May the federal government change the boundary line of an Executive Order Indian Reservation by resurveying the Indian Trust Land without Congressional approval?

3. May the private parties affected by a resurvey of Indian Trust Land challenge the validity of said resurvey in United States District Court?

Parties to the Proceeding

Plaintiffs/Appellants/Petitioners:

Ellen Mannatt

Robert Mannatt

Bruce Mather

Defendants/Respondents:

United States of America

Fort Independence Indian Reservation

Daniel Miller, Sr.

Daniel Miller, Jr.

Allen Wilder

TABLE OF CONTENTS

BASIS FOR JURISDICTION 1
CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, ORDINANCE AND REGULATIONS
28 U.S.C. § 2409a. Real Property Quiet Title Actions ... 3
44 Statutes at large 1347, Chap. 299 3
43 U.S.C. Section 772 Resurveys or retracements to mark boundaries of undisposed lands 3
25 U.S.C. Section 176 Survey of reservations 4
STATEMENT OF THE CASE
Procedural Background 5
Factual Background 6
LEGAL ANALYSIS
I. STANDARD OF REVIEW 8
II. DISTRICT COURT HAS JURISDICTION TO ESTABLISH BOUNDARY LINE 9
A. Federal District Courts Have Jurisdiction Where Real Property Claimed by the United States is at Issue 9
B. Federal District Court Jurisdiction Is Limited 9
C. This Action Is to Establish/Clarify Boundary Line 11
D. District Court Has Jurisdiction to Establish Boundary Line 12
E. Indian Reservation Boundaries Are Fixed at Time of Creation 13
F. Once Boundaries Are Set, Government Cannot Alter Them 14
G. Indian Reservations Are To Be Surveyed Using the Same Rules 19
H. Boundaries Established by a Re-survey Are a Questions of Fact 19
I. Courts Are Not To Restrict the Scope of a Statute 21
J. The District Court Has Jurisdiction 21

III. MANDAMUS 22
IV. EXPANSION OF RESERVATION ILLEGAL..... 22
CONCLUSION 23

APPENDIX
MEMORANDUM..... 25
ORDER 29
AMENDED ORDER GRANTING DEFENDANT UNITED STATES MOTION TO DISMISS CLAIM NO. 1 (Boundary Line Dispute) AND (Doc 163) ORDER DIRECTING THE CLERK OF THE COURT TO TRANSFER THE CASE TO THE COURT OF CLAIMS 30
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY UNITED STATES FOR DISMISSAL BASED ON LACK OF SUBJECT MATTER JURISDICTION 40
THIRD AMENDED COMPLAINT TO ESTABLISH BOUNDARY LINE; INVERSE CONDEMNATION; AND WRIT OF MANDATE..... 51
EXECUTIVE ORDER NO. 2264 65
EXECUTIVE ORDER NO. 2375 66
28 U.S.C. § 2409a Real Property Quiet Title Actions .. 67
44 Statutes at Large 1347, Chapter 299 70

TABLE OF CITATIONS

Cases

Arizona v. California 373 U.S. 546 (Arizona I) 10
Arizona v. California 460 U.S. 605 (Arizona II) 10, 12, 13
Block v. North Dakota 461 U.S. 273 (1983) 11
California v. United States 490 U.S. 920 (1989) 9, 13, 24
Cragin v. Powell 128 U.S. 691 (1887) 15, 17
Galt et al. v. Willingham 11 F.2d 757 (5th Cir. 1926) 19
Lane v. Darlington 249 U.S. 331 17
Mannatt v. United States 951 F.Supp. 172 (E.D. Cal. 1996) .5
Metropolitan Water District of Southern California v. United States 830, Fed. 2d 139 (9th Cir. 1987) 9, 13, 24
Moore v. Robbins 96 U.S. 530 (1877) 15
Navajo Tribe v. New Mexico, 809 F.2d 1455 [14 Indian L. Rep. 2022] (10th Cir. 1987) 11
New Mexico v. Department of Interior, 820 F.2d 441 (D.C. Cir. 1987) 12
Pueblo of Sandia v. Babbitt, et al. No. 94-2624 (D.D.C., Dec. 10, 1996) 24 Indian L. Rep. 3078 12
Sioux Tribe of Indians v. United States 316 U.S. 317 (1942) 18
Spawr v. Johnson 31 P. 664 (Kansas, 1892) 16
United States v. Doyle 468 F.2d 633 (10th Cir. 1972) 19
United States v. Mottaz 476 U.S. 834 (1986) 11
United States v. Reimann 504 F.2d 135 (10th Cir. 1974) 14
United States v. State Investment Company 264 U.S. 206 (1924) 16
United States v. Stotts 49 F.2d 619 (9th Cir.. 1930) 13
Ute Indians v. United States 330 U.S. 169 (1947) 17

Statutes

25 U.S.C. Section 176 ..... 4, 19, 21
28 U.S.C. Section 1341 1
28 U.S.C. Section 1346 ..... 1, 9
28 U.S.C. Section 2409a 3, 9, 10

41 Statutes at Large 3, 34, Chapter 4 19
43 U.S.C. Section 666 3
43 U.S.C. Section 772 .....3, 8, 14, 22
43 U.S.C. Section 773 8
44 Statutes at Large 1347, Chapter 299 .....3, 7, 14, 18, 19, 22

Other Authorities

92d. Cong. 2d Sess. reprinted at 1972 U.S.C.C.A.N. 4547..11

Treatises

73 *Am.Jur. 2d* Statutes Section 199.....21
73 *Am.Jur. 2d* Statutes Section 200.....21

BASIS FOR JURISDICTION

The United States Court of Appeal for the Ninth Circuit issued a Memorandum Ruling on July 1, 1999 affirming the decision of the United States District Court for the Eastern District of California to dismiss the case.

The Order denying Appellants' Petition for Rehearing was filed on August 27, 1999.

This Court has jurisdiction to review the case in the courts of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

The United States is a party hereto, consequently no notification pursuant to Rule 29.4(b) is required.

Rule 29.4(c) is not applicable.

The underlying action was filed in United States District Court pursuant to 28 U.S.C. Section 1346; 28 U.S.C. Section 1346(a)(2) {Tucker Act}; and 28 U.S.C. Section 1341 {Federal Question}.

The underlying action is by individuals who own property adjacent to or within Indian land against the United States of America and Fort Independence Indian Reservation for altering the boundary lines between the Indian Reservation and their land. Said action was composed of four causes of action: (1) Determination of Boundary Line; both (2) and (3) for Inverse Condemnation; and (4) Writ of Mandate.

Respondent United States of America brought a Motion to Dismiss the underlying action based on the District Court's alleged lack of subject matter jurisdiction of the action. Respondents Fort Independence Indian Reservation, Daniel Miller Sr., Daniel Miller Jr., and Allan Wilder joined in said Motion.

On March 31, 1998, the District Court granted the motion to dismiss as to the First and Fourth Causes of Action {Boundary Line and Writ of Mandate} and denied it as to the Second and Third Causes of Action {Inverse Condemnation}. Those were transferred to the Court of

Claims and are pending (98-689 L). An Amended Order granting said motion was filed on April 13, 1998.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCE AND REGULATIONS

28 U.S.C. § 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(Balance of statute is set forth in full in appendix.)

44 Statutes at Large 1347, Chap. 299

An Act To authorize oil and gas mining leases upon unallotted lands within Executive order Indian reservations.

SEC. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

(Complete statute is set forth in appendix.)

43 U.S.C. Section 772 Resurveys or retracements to mark boundaries of undisposed lands

The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining

undisposed of: *Provided*, That no such re-survey or retracement shall be so executed as to impair the bona fide rights of claims of any claimant, entryman, or owner of lands affected by such re-survey or retracement.

25 U.S.C. Section 176 Survey of reservations

Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land-Office [Bureau of Land Management], and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

STATEMENT OF THE CASE

Procedural Background

First Amended Complaint was filed on December 11, 1992, to fully state the jurisdictional grounds in preparation for a Motion to Dismiss.

Motion to Dismiss was heard and granted with leave to amend. Said Order was published as Mannatt v. United States 951 F.Supp. 172 (E.D. Cal. 1996).

Second Amended Complaint was filed for a general stream adjudication under the McCarran Amendment naming all potential owners of water rights in the Oak Creek Water System, including State of California.

State of California brought a Motion to Dismiss based upon Eleventh Amendment immunity.

Rather than litigate the immunity issue, Petitioners elected to dismiss the water rights issues and to proceed only on the boundary line dispute in United States District Court. Consequently, a Third Amended complaint was filed for the boundary line dispute, inverse condemnation and writ of mandate.

Petitioners are proceeding in state court as to the water rights issue.

Respondent United States of America brought a Motion to Dismiss based on the District Court's alleged lack of subject matter jurisdiction over the action. Respondents Fort Independence Indian Reservation, Daniel Miller Sr., Daniel Miller Jr., and Allan Wilder joined said Motion.

On March 31, 1998, the Motion to Dismiss was granted as to the Boundary Line and Writ of Mandate issues and denied as to the Inverse Condemnation. The Inverse Condemnation was ordered transferred to the Federal Court of Claims where it is pending (98-689 L).

Petitioners filed their Notice of Appeal on May 11, 1998.

The Ninth Circuit Court of Appeal affirmed the District Court on July 1, 1999 and denied Petitioners' Petition for Rehearing on August 27, 1999.

Factual Background:

1. Mannatt/Mather own a lot of land that was a portion of land originally patented to Charles A. Walter on January 7, 1885. The patent, signed by President Chester A. Arthur, made reference to a plat of survey in the General Land Office. This lot is hereinafter referred to as the "Mannatt/ Mather" lot.

2. Fort Independence Indian Reservation was created on October 28, 1915, by Executive Order. Said Executive Order permanently withdrew from all forms of settlement, location, entry, sale or other disposition and reserved for the Camp or Fort Independence Indians entitled to allotments thereon. Specific land was identified and withdrawn as provided in plats of survey approved on May 3, 1913 and November 12, 1856. Said Reservation was increased in size by another Executive Order on April 16, 1916. Both these Executive Orders stated **"this withdrawal is made subject to any valid existing rights of any person or persons"**.

3. Said 1913 plat of survey was based upon a survey made in 1912 by S. P. Matthews. The survey notes from Matthews indicate that the boundary line now in dispute runs along the north side of a fence.

4. Prior to 1912, there was a survey performed on behalf of Fort Independence in 1903. Said survey provided a subdivision of a portion of the reservation lands. That said survey identified the northern boundary line that is disputed herein to be a line of "old locust trees". This being the historic boundary line between the property and the Indian Reservation until the Reservation unilaterally moved the fence in 1992.

5. Said 1903 survey was used in 1904 as a basis for dividing four tracts of the reservation land into eight tracts.

6. In 1923, a patent was issued for a lot that was contained within this 1915 reservation. It is now owned by the Mannatt Petitioners and designated as "Mannatt Lot".

7. In 1927, Congress passed 44 Statutes at Large 1347,

Chapter 299, which prohibits any changes in the boundary of reservations created by executive order, proclamation, or otherwise, for use and occupation of Indians, except by act of Congress. A portion set out immediately below:

> "Sec. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for use and occupation of Indians shall not be made except by Act of Congress: Provided, That this shall not apply to temporary withdrawals by the Secretary of the Interior. 44 Statutes at Large 1347, Chapter 299.

8. In 1994, the Bureau of Land Management conducted a re-survey of the disputed land and placed corner markers north of the historical boundary line and thus reducing the size of Mannatt/Mather Lot. Said instructions identify the history of surveys for the effected land; however, they do not identify a 1952 United States Indian Service re-survey of the boundary line of the Fort Independence Indian Reservation. According to the field notes for the 1994 survey:

> "In 1952, the United States Indian Service resurveyed the boundary of the Fort Independence Indian Reservation. Original found corners were remonumented and lost corners were reestablished. No record of this survey was found. According to the Bureau of Indian Affairs office in Sacramento, this survey was considered unofficial, and the records were eventually destroyed. The position of the 1952 USIS monuments were verified and accepted as a careful and faithful reestablishment of the positions of the original corners."

BLM simply accepted these USIS markers, from an unofficial survey without field notes, as "a careful and faithful reestablishment", whereas other survey markers which were placed without reference to the USIS markers were discredited and not used. Said survey used metes-and-

bounds to reestablish the disputed corner points.

9. Said survey also moved the boundary lines of the Mannatt Lot.

10. Said 1994 survey by the Bureau of Land Management was undertaken as a direct result of this litigation and at the request of the Bureau of Indian Affairs for use within this litigation.

11. Petitioners specifically contend that the Bureau of Land Management did not follow the Special Instructions for said 1994 survey. Further, said survey violated Sections 43 U.S.C. 772 and 43 U.S.C. 773 in that "no such re-survey or re-tracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands effected by such re-survey or re-tracement".

The United States, after said survey, made a bold statement of claiming those new lands as part of the reservation and taking them into trust status. The United States, in its Memorandum of Points and Authorities in Support of Motion by United States for Dismissal Based on Lack of Subject Matter Jurisdiction, stated:

> "The United States Department of Interior, Bureau of Land Management, has completed and published a survey of the boundaries between the Indian trust lands and the contiguous properties of the Petitioners. **Based on that formal survey, the United States hereby declares and claims its interest in the disputed property on behalf of the Fort Independence Indian Tribe,** pursuant to and consistent with the BLM survey of the boundaries in question." (See Appellant's Excerpts of Record, page 202.)

LEGAL ANALYSIS

I.

STANDARD OF REVIEW

This Court should grant this Petition for Writ of

Certiorari because this Court left the issue as to the determination of boundary line involving Indian Reservation unsettled when this Court affirmed, by an equally divided vote, the Ninth Circuit Court of Appeals' decision in Metropolitan Water District of Southern California v. United States 830, Fed. 2d 139 (9th Cir. 1987). This Court affirmed California v. United States 490 U.S. 920 (1989) on an equally divided Court, with Justice Marshall not taking part in the consideration or decision.

In the underlying action, the facts are undisputed. The issue is the application of the law to those facts and the determination that the District Court lacked jurisdiction to hear their case.

II.
DISTRICT COURT HAS JURISDICTION TO ESTABLISH BOUNDARY LINE

A. Federal District Courts Have Jurisdiction Where Real Property Claimed by the United States is at Issue. The district courts shall have exclusive original jurisdiction of civil action under section 2409a to quiet title to an estate or interest in real property in which the United States claims an interest. 28 U.S.C.A. § 1347(f).

B. Federal District Court Jurisdiction Is Limited. The United States may be named as a party Respondent in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect action which may be or could have been brought under sections 1346, 1347, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666). 28 U.S.C.A. § 2409a.

Petitioners contend, pursuant to 28 U.S.C.A. Section 1346(f), that where the United States claims interest in real

property, the District Courts have jurisdiction. The issue before this Court is not if the District Court has jurisdiction, but whether or not the United States has waived its sovereign immunity to suit. The Quiet Title Act at 28 U.S.C. Section 2409a is a waiver of sovereign immunity. It has no impact upon the jurisdiction of the District Courts.

Further, the wording within the Executive Orders creating this reservation, that "**this withdrawal is made subject to any valid existing rights of any person or persons**" implies there is a remedy to enforce those existing rights.

In addressing whether or not water rights were reserved for reservations created by treaty, statute, or executive orders, This Court, in Arizona v. California 373 U.S. 546, 597, 10 L. Ed. 2d 542, 576 (Arizona I), stated that,

> "and while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a state that its rights to water should be determined by the doctrine of equitable apportionment. Moreover, even were we to treat Indian reservations like a state, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and executive orders creating the reservations."

This Court again repeated the same statement in Arizona v. California 460 U.S. 605, 616, 75 L. Ed. 2d 318, 331 (Arizona II). Clearly the Court is indicating that you must look to the Executive Order and the wording of it creating the reservations to make any determinations as to the issues of the reservations, such as water rights and boundaries.

How are the "valid existing rights of any person or persons" which are protected in the Executive Orders creating Fort Independence Indian Reservation going to be protected unless there was a waiver of sovereign immunity when the reservation was created. Otherwise said wording

would be meaningless and would violate this Court's ruling in Arizona I and II.

C. This Action Is to Establish/Clarify Boundary Line. Although denominated as an action to "Quiet Title" this action is one to establish a boundary line between the Reservation and Lots "A" and "B". This is one of the specific purposes of the Quiet Title Act:

> "Perhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property." H.R. Report No. 92-1559, 92d. Cong. 2d Sess. reprinted at 1972 U.S.C.C.A.N. 4547 4554.

Respondents' earlier reliance on Block v. North Dakota 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983) and United States v. Mottaz 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986) is misplaced.

Block involved an effort by North Dakota to claim title to certain portions of the Little Missouri River. While Mottaz involved a woman attempting to assert that the United States did not have valid title to certain former Indian allotments and therefore could not sell them. Neither Block nor Mottaz involved Indian trust land and both were decided on a statute of limitations issue.

In addressing a boundary dispute for an Indian Reservation the United States District Court for the District of Columbia stated:

> "Decisions interpreting *Block* and *Mottaz* further support the proposition that the Quiet Title Act does not govern claims which do not seek to divest the government of title. *See, e.g., Navajo Tribe v. New Mexico*, 809 F.2d 1455 [14 Indian L. Rep. 2022] (10th Cir. 1987). There the Navajo Tribe sued to reclaim title to unallotted Navajo reservation land which had been given to the State of New Mexico and to private landowners

> pursuant to executive orders providing that any unallotted lands be returned to the public domain. The government's reliance on this precedent for the proposition that the Navajos' claim was time-barred under QTA is undercut by the court's clear admonition that, "[i]f the Tribe wishes to pursue continued reservation status, as opposed to title, of the subject lands, it is not precluded from filing a declaratory judgment action to determine its reservation boundary lines..." 809 F.2d at 1475, n.29. The Court of Appeals for this Circuit has also recognized that an action to clarify reservation boundaries is distinct from a quiet title action, and is therefore not barred by the statute of limitations in the QTA. *New Mexico v. Department of Interior*, 820 F.2d 441, 447 [14 Indian L. Rep. 2103] (D.C. Cir. 1987)." Pueblo of Sandia v. Babbitt, et al. No. 94-2624 (D.D.C., Dec. 10, 1996) 24 Indian L. Rep. 3078, 3080. (Emphasis added).

Appellants are attempting to clarify reservation boundaries, they are not attempting to assert title to reservation land.

If this Court does not have jurisdiction, then there would be absolutely no way to definitely establish a boundary line between Indian Trust Land and private land.

D. District Court Has Jurisdiction to Establish Boundary Line. Arizona v. California involved adjudication of water rights and boundary disputes involving Indian Trust Land. (Arizona v. California (1983) 460 U.S. 605, 75 L.Ed. 318 (Arizona II)). In Arizona II, this Court ruled that the District Courts were available and the suitable forum to settle disputes as to boundary lines between Indian Trust Land and other parties. Arizona II from pages 637 to 640 and specifically page 639.

This Court, in Arizona II, specifically indicated that

District Courts were available as a suitable forum to settle disputes as to boundary lines. Respondents are relying upon this Court's affirmation of the 9th Circuit Court of Appeal's decision in Metropolitan Water District of Southern California v. United States 830, Fed. 2d 139 (9th Cir. 1987). This Court affirmed California v. United States 490 U.S. 920, 109 S. Ct. 2273 (1989) by an equally divided Court, with Justice Marshall not taking part in the consideration or decision. It was a 4-4 decision, consequently the decision was affirmed, but that should not give credence to the decision's underlying basis.

Within Metropolitan Water District there is a fundamental difference. The United States had settled its boundary line disputes with private land holders through independent Quiet Title Act actions. See Arizona II 460 U.S. at 656, footnote 9, where the Court determined that other disputed boundaries had been 'finally determined' by judicial adjudications that the states have not challenged. It approved amending the 1964 decree to include water rights appertaining to these parcels. What remained in Metropolitan Water District was a challenge to the Secretary of the Interior re-survey of government land and altering of boundaries within its own federal property. The court in Metropolitan Water District may have ruled differently had the re-survey affected private property rights as it does in the instant appeal.

E. Indian Reservation Boundaries Are Fixed at Time of Creation. Fort Independence Indian Reservation was established by two Executive Orders, one in 1915 and another in 1916, which set aside specific land. The Executive Order defining the limits to the Reservation is conclusive as to the boundaries. United States v. Stotts 49 F.2d 619, 620 (9th Cir. 1930). The Executive Order, which withdrew land for the Fort Independence Indians, was explicit as to the land to be contained therein and identified specific lots of land in accordance with either an 1856 or

1913 plat of survey, depending upon the lot. In 1927, Congress enacted Public Law No. 702 that provides:

> "Sec. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for use and occupation of Indians shall not be made except by Act of Congress: Provided, That this shall not apply to temporary withdrawals by the Secretary of the Interior. 44 Statutes at Large 1347, Chapter 299.

By re-surveying Fort Independence Indian Reservation, the United States changed the boundaries of a reservation created by Executive Order without an act by Congress, an action specifically prohibited by statute.

F. Once Boundaries Are Set, Government Cannot Alter Them. The United States' position in this matter is that it can re-survey Reservation boundaries at any time, and based upon that new survey, change boundary lines. This would create a result that there would be no certainty as to title nor boundaries to real property. Said position is in violation of Federal law, specifically, 43 U.S.C. Section 772 which provides:

> "The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided*, That no such re-survey or retracement shall be so executed as to impair the bona fide rights of claims of any claimant, entryman, or owner of lands affected by such re-survey or retracement."

In a case similar to this one, the Tenth Circuit Court of Appeals in United States v. Reimann 504 F.2d 135 (10th Cir. 1974) stated that "the Government retains no power to nullify

a patent nor the survey upon which it is based once patent has issued". In Reimann, the United States, at a later date, resurveyed lands and attempted to alter boundary lines based upon that survey which affected both federal land and private property. The Court stated "prior to title passing from the United States, it is undisputed that the Government has the power to survey and resurvey, establish and reestablish boundaries on its own lands. But once patent has issued, the rights of the patentees are fixed and the Government has no power to interfere with these rights, as by a corrective resurvey. Cragin v. Powell 128 U.S. 691 (1887). The Government has no power to control previously disposed of lands. These authorities support the rule that the Government is bound by the last official survey accepted prior to its divestment of title." The Reimann Court quoted Moore v. Robbins 96 U.S. 530 (1877) at 533-534:

> "...in all this there is no place for the further control of the Executive Department over the title. The functions of that Department necessarily cease when the title has passed from the Government. And the title does so pass in every instance where under the decision of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the Secretary nor any other Executive Officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would always be subject to the fluctuating, and in many cases unreliable, actions of the land office. No man could buy of the grantee with safety, because he could only convey

> subject to the right of the officers of the Government to annul his title. If such a power exists, when does it cease? There is no statute of limitations against the Government; and if this right to reconsider and annul a patent after it has once become perfected exists in the Executive Department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded."

The Kansas Supreme Court, in Spawr v. Johnson 31 P. 664 (Kansas, 1892), stated:

> "After the Government parted with its title, and it had been vested in the settlers, no officer of the land department had the right to order or approve a resurvey that changed the boundaries of the specific parcels of land to which the various settlers had title, in that in the absence of any claim or showing that fraud had been practiced by them or one in their interest. Section 2396 of the revised statues to the United States provides: "the boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended."

As with Spawr, the original patent issued in this matter was issued in 1885 and signed by President Chester A. Arthur. Consequently this same revised statute as to determination of boundary lines should apply to this patent as to the patent issued in Spawr. Altering those boundary lines by later survey would be taking property without just compensation, in violation of the United States Constitution.

This Court in United States v. State Investment Company

264 U.S. 206, 68 L. Ed. 639, 642 (1924) states:

> "Although the power to correct surveys on public land belongs to the political department of the government, and the land department has jurisdiction to decide as to such matters while the land is subject to its supervision and before it takes final action (citations omitted, said citations include Cragin v. Powell 128 U.S. 691, 698, which was cited by Petitioners in their opening brief on page 13) this power of supervision and correction by the Department is 'subject to the necessary and decided limitation' that when it has once made and approved a governmental survey of public lands, and has disposed of them, the Courts may protect the private rights acquired against interference by corrective surveys subsequently made by the Department, (citing again Cragin v. Powell supra p. 699). A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the government, after conveyance of the land, having 'no jurisdiction to intermeddle with them in the form of a second survey' (citations omitted). And although the United States, so long as it has not conveyed its lands, may survey and resurvey what it owns, and establish and reestablish boundaries, what it thus does is 'for its own information,' and 'cannot affect the rights of owners on the other side of the line already existing.' (Citing Lane v. Darlington 249 U.S. 331, 33, 63 L. Ed. 629, 630.)"

In Ute Indians v. United States 330 U.S. 169, 91 L. Ed. 823 (1947) this Court drew a marked distinction between the Executive Order reservations and those created by either statute or treaty. In substance, it provides that an Executive Order reservation creates no ownership interest in the land

within the tribe, whereas a statutory/treaty reservation would. The Court states, "the additional claim, in so far as it rests on the Executive Order of 1875, cannot be sustained. For the president had no authority to convey to the petitioners a compensable interest in the lands described in the ordered line north of the true 1868 boundary." 330 U.S. at 176. The Court goes on to say,

> "While it has long been the rule that a treaty with Indians is to be construed so as to carry out the government's obligation in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite Congressional Acts so as to make them mean something they obviously were not intended to mean."

By re-surveying the reservation and then claiming the disputed land on behalf of the reservation clearly goes against the Court's ruling in Ute Indians as to executive authority. Said executive authority violates 44 Statutes at Large 1347, Chapter 299.

The distinction between Executive Order reservations and treaty reservations was initially discussed in Sioux Tribe of Indians v. United States 316 U.S. 317, 86 L. Ed. 1501 (1942). Said case discusses the president's limited authority to create Executive Order reservations with some type of property interest transferred to the Indians. The case states,

> "by 1855 the president began to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations. From that date until 1919[6] hundreds of reservations for Indian occupation and for other purposes were created by executive order."

Footnote 6 of said case provides,

> "by § 27 of the Act of June 30, 1919, Congress declared that thereafter, 'no public lands of the

> United States shall be withdrawn by executive order, proclamation, or otherwise, for or as an Indian reservation except by Act of Congress.' 41 Statutes at Large 3, 34, Chapter 4. In [March 3] 1927 Congress added a provision that any future changes in the boundaries of Executive Order reservations should be made by Congress alone. Section 4, 44 Statutes at Large 1347, Chapter 299."

This is the specific statute that Petitioners are relying upon which prohibits the Bureau of Land Management from conducting its re-survey and claiming new land because of the new boundaries.

G. Indian Reservations Are To Be Surveyed Using The Same Rules. Congress has enacted the rule that Reservations are to be surveyed using the same rules and regulations as under which other public lands are to be surveyed. 25 U.S.C. Section 176 provides:

> "Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land-Office [Bureau of Land Management], and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed."

H. Boundaries Established by a Re-survey Are a Question of Fact. In re-establishing the lines of a survey the footsteps of the original surveyor should be followed and it is immaterial that the lines actually run by him are not correct. "... this rule is so strict that even the Government itself cannot question it." Galt et al. v. Willingham 11 F.2d 757 (5th Cir. 1926). The Tenth Circuit Court of Appeals, in United States v. Doyle 468 F.2d 633 (10th Cir. 1972), states:

> "The original survey as it was actually run on the ground controls. It does not matter that the boundary was incorrect as originally established.

A precisely accurate re-survey cannot defeat ownership rights flowing from the original grant and the boundaries originally marked off. The conclusiveness of an inaccurate original survey is not affected by the fact that it will set awry the shapes of sections and subdivisions.

"The actual location of a disputed boundary line is usually a question of fact. The generally accepted rule is that a subsequent re-survey is evidence, although not conclusive evidence, of the location of the original line."

...

"The procedures for restoration of lost or obliterated corners are well established. ... They are stated by the cases cited below and by the supplemental manual on Restoration of Lost or Obliterated Corners and Subdivisions of Sections of the Bureau of Land Management (1963 ed.). The supplemental manual sets forth practices and contains explanatory and advisory comments.

...

"The authorities recognize that for corners to be lost 'they must be so completely lost that they cannot be replaced by reference to any existing data or other sources of information.' Before courses and distances can determine the boundary, all means for ascertaining the location of the lost monuments must first be exhausted.

"The means to be used include collateral evidence such as boundary fences that have been maintained, and they should not be disregarded by the surveyor. Artificial monuments such as roads, poles, fences and improvements may not be ignored. And the surveyor should consider information from owners and former residents of property in the area. It is so much more

satisfactory to so locate the corner than regard it as 'lost' and locate by 'proportionate' measurement." {Citations omitted}

Even though the BLM re-surveyed the disputed boundaries and set new corner markers, the correctness of that survey is a question of fact for which this Court has jurisdiction to determine if the BLM surveyor followed the footsteps of S. P. Matthews.

I. Courts Are Not To Restrict the Scope of A Statute. In the construction of a statute, the general rule is that the court may write no limitations therein. As variously expressed, the statute may not be restricted, constricted, qualified or narrowed. Hence, general words are to have a general operation where the manifest intention of the legislature affords no ground for qualifying or restraining them. The legislature will be presumed to have intended to make no limitation to a statute in which it has included by general language many subjects, persons or entities without limitation. 73 *Am.Jur. 2d* Statutes Section 199.

It is a general rule that the courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything, therefrom. To the contrary, it is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded to every word, phrase, sentence, and part of an act. 73 *Am.Jur. 2d* Statutes Section 200.

The statutes relied upon by Petitioners are specific as to the conduct of a re-survey and the limitations on the changing of boundaries of an Executive Order Indian Reservation. The United States has violated both Statutes.

J. The District Court Has Jurisdiction. The United States District Court, based upon the explicit statements made in Arizona II by this Court, has the jurisdiction to determine the boundary line between the Reservation and the Mannatt/Mather Lot and the Mannatt Lot.

III
MANDAMUS

Respondents contend that the Court did not have jurisdiction to compel the Bureau of Land Management (BLM) to perform a re-survey after it completed its survey as part of the litigation.

Once BLM undertook the re-survey, it was to perform it as required by statute. This is a duty owed to Petitioners. 25 U.S.C. Section 176 requires surveys of Indian reservations to be conducted in conformity to the rules for surveying other public lands. The rules for surveying other public lands are set forth in 43 U.S.C. Section 772 which provides that re-surveys are not to affect the bona fide rights of the owners of the land affected.

These statutes are positive direction on how the task is to be accomplished. The District Court has the authority to compel the completion of those tasks in accordance with statute.

IV
EXPANSION OF RESERVATION ILLEGAL

There is a clear distinction between Executive Order reservations and reservations created by treaty. The Congress, in 44 Statutes at Large 1347, Chapter 299, Section 3, went so far as to give the States the power to levy and collect taxes upon improvements of any lessee upon lands within an Executive Order Indian Reservation

Congress has limited the executive branch's ability to modify the boundaries of all Executive Order Indian Reservations.

The United States, after the survey, made a bold statement of claiming those new lands as part of the reservation and taking them into trust status.

The United States, in its Memorandum of Points and Authorities in Support of Motion by United States for Dismissal Based on Lack of Subject Matter Jurisdiction, stated:

> "The United States Department of Interior, Bureau of Land Management, has completed and published a survey of the boundaries between the Indian trust lands and the contiguous properties of the Petitioners. **Based on that formal survey, the United States hereby declares and claims its interest in the disputed property on behalf of the Fort Independence Indian Tribe,** pursuant to and consistent with the BLM survey of the boundaries in question."

The United States cannot make such a declaration/claim because of the Statute prohibiting the increase in the size of Executive Order Reservations without Congressional approval. Consequently, because the United States has no authority to claim that additional ten feet as part of an Executive Order Indian Reservation held under trust, it must be regular land of the United States, for which actions under the Quiet Title Act would lie.

In order for the Quiet Title Act not to apply then the United States' illegal actions would have to be valid. They are not valid. Therefore the Petitioners have the authority under the Quiet Title Act to litigate the issue of this ten feet of land because it is properly not included within the Executive Order Reservation.

CONCLUSION

Land held in trust by the United States for Indian Reservations is located throughout the United States but particularly in the western states. Each of these reservations has a boundary line demarking the reservation land and private property adjacent to it.

The federal government through the guise of a re-survey could simply alter the historic reservation boundaries and take more land, ever increasing the size of the reservations without redress to those parties whose land was taken.

A boundary line is simply a line plotted across the ground based upon surveys. For every such line, there are two sides

— Reservation land on one side and private land on the other. Who is to determine and establish the location of the private side of that plotted line? The United States does not own that side of the boundary line.

There must be a way to definitively establish the location of each boundary line; otherwise, private ownership of land will always be in question.

This court must state:

1. Members of an Indian Tribe may not unilaterally alter an historic boundary line by removing an existing fence and erecting a new fence on land that was formerly private property.

2. The federal government may not change the boundary line of an Executive Order Indian Reservation by resurveying the Indian Trust Land without Congressional approval.

3. Private parties affected by a resurvey of Indian Trust Land may challenge the validity of said resurvey in United States District Court.

This Court should grant this Petition for Writ of Certiorari and resolve the issue as to the determination of boundary lines involving Indian reservations it left unsettled when it upheld the Ninth Circuit Court of Appeals' decision in Metropolitan Water District of Southern California v. United States 830, Fed. 2d 139 (9th Cir. 1987) by affirming California v. United States 490 U.S. 920 (1989) by an equally divided Court.

This court must state: the United States District Court has the jurisdiction to determine the boundary line between land held in trust by the United States as an Indian reservation and adjacent private property.

APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 1 1999
CATHY A. CATTERSON,
CLERK U.S. COURT OF APPEALS

ELLEN MANNATT; ROBERT MANNATT; and BRUCE MATHER, Plaintiffs-Appellants,	No. 98-15897 D.C. No. CV-92-05293-DLB
v.	MEMORANDUM[1]
UNITED STATES OF AMERICA; FORT INDEPENDENCE INDIAN RESERVATION; DANIEL MILLER, JR.; ALLEN WILDER; WILLARD L. MATHER; JACQUETTA R. MATHER; LONA BURKHART; EUGENE C.BURKHART; LOUISE A WALKER; MARIE E. HURLBUT; CARL HERMAN WALTERS; NELLIE E. LONNOAGIN; OWENS VALLEY UNIFIED SCHOOL DISTRICT; DANIEL MILLER, SR., Tribal Chairman; and DANIEL MILLER, SR., an individual, Defendants-Appellees.	

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Eastern District of California
Dennis L. Beck, Magistrate Judge, Presiding
Submitted June 16, 1999[2]
San Francisco, California

Before: T.G. NELSON, HAWKINS, and GRABER, Circuit Judges.

Plaintiffs own a parcel of real property in Inyo County; its southern border abuts the Fort Independence Indian Reservation (Reservation). In 1994, the Bureau of Land Management (BLM) conducted a new survey of the Reservation that relocated the Reservation's northern border to a point farther to the north. That new survey thus relocated the southern boundary of Plaintiffs' property and reduced the size of Plaintiffs' parcel.

This action challenges the BLM's 1994 survey. Plaintiffs' Third Amended Complaint included four claims. The first alleged that the BLM unlawfully had relocated the northern boundary of the Reservation and requested that the district court determine the "true and correct" location of the shared boundary line. The second and third claims alleged that the United States had taken private property without due process or just compensation, in violation of the Fifth Amendment. Plaintiffs' final claim sought a writ of mandamus from the district court that would direct the BLM to conduct an "independent" new survey of the disputed land.

The district court dismissed counts one and four on the ground that it lacked subject matter jurisdiction under the Quiet Title Act (QTA), 28 U.S.C. § 2409a(a), to adjudicate a boundary dispute involving Indian trust land. The district court transferred counts two and three to the Court of Federal

---

[2] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Claims, citing 28 U.S.C. §§ 1346(a)(2) and 1491. In this timely appeal, Plaintiffs challenge only the district court's dismissal of counts one and four.

This court reviews de novo the district court's dismissal of an action for lack of subject matter jurisdiction. See H20 Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 916 (9th Cir. 1996). The district court''s findings of fact on the issue of jurisdiction are subject to review for clear error. See id.

"[W]hen the United States has an interest in . . . disputed property, the waiver of sovereign immunity must be found, if at all, within the QTA." Alaska v. Babbitt, 38 F.3d 1068, 1073 (9th Cir. 1994); see also Alaska v. Babbitt, No. 95-36122, slip op. at 6585, 6591 (9th Cir. June 18, 1999). The QTA provides in part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands...."

28 U.S.C. § 2409a(a) (emphasis added). As is plain from the statute, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the [QTA] does not waive the Government's immunity." United States v. Mottaz, 476 U.S. 834, 843 (1986) (footnote omitted).

Plaintiffs attempt to avoid the fatal consequence of applying the QTA by arguing that this action, although styled as an action to quiet title, "is one to establish a boundary line between the Reservation" and Plaintiffs' property so that the QTA does not apply. This court rejected that very argument in Metropolitan Water District v. United States, 830 F.2d 139, 143-44 (9th Cir. 1987), aff'd sub nom. by an equally divided court, California v. United States, 490 U.S. 920

(1989).

Plaintiffs' reliance on Arizona v. California, 460 U.S. 605 (1983), misses the mark. Although the Supreme Court in that case hinted that a federal district court might be available to settle a boundary dispute involving Indian lands, the Court did not reach the merits of that issue. See id. at 638.

Finally, with respect to Plaintiffs' claim for a writ of mandamus, the district court correctly dismissed that cause of action, because the district court had no independent jurisdictional ground to issue the writ. See Lights of America, Inc. v. United States Dist. Court, 130 F.3d 1369, 1370 (9th Cir. 1997) ("[C]ourts must possess an independent source of jurisdiction before entertaining a request for a writ of mandamus.").

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 27 1999
CATHY A. CATTERSON,
CLERK U.S. COURT OF APPEALS

ELLEN MANNATT; ROBERT MANNATT; and BRUCE MATHER,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; FORT INDEPENDENCE INDIAN RESERVATION; DANIEL MILLER, JR.; ALLEN WILDER; WILLARD L. MATHER; JACQUETTA R. MATHER; LONA BURKHART; EUGENE C.BURKHART; LOUISE A WALKER; MARIE E. HURLBUT; CARL HERMAN WALTERS; NELLIE E. LONNOAGIN; OWENS VALLEY UNIFIED SCHOOL DISTRICT; DANIEL MILLER, SR., Tribal Chairman; and DANIEL MILLER, SR., an individual,
Defendants-Appellees.

No. 98-15897

D.C. No. CV-92-05293-DLB

ORDER

Before: T.G. NELSON, HAWKINS, and GRABER, Circuit Judges.

The petition for rehearing is denied.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

ELLEN MANNATT; et al.,	) CV-92-05293-DLB
	)
Plaintiffs,	) **AMENDED**
	) ORDER GRANTING
vs.	) DEFENDANT UNITED
	) STATES MOTION TO
UNITED STATES	) DISMISS CLAIM NO. 1
OF AMERICA; et al.,	) (Boundary line dispute)
	) AND (Doc 163)
Defendants.	)
	) ORDER DIRECTING THE
	) CLERK OF THE COURT TO
	) TRANSFER THE CASE TO
	) THE COURT OF CLAIMS

On January 20. 1998. Defendant United States of America's motion to dismiss was heard before the undersigned. William Shipley appeared for Defendant United States. Frederick Marr appeared for defendant Fort Independence Tribe and the individual Tribal defendants, and Kirk Livermont appeared for Plaintiffs.

BACKGROUND

Plaintiffs' Third Amended Complaint contains four claims. The first claim is labeled "Determination of Boundary Line" and is brought for the purpose of resolving a real property boundary dispute between Plaintiffs and the United States, as trustee of the Fort Independence Indian Reservation. The second and third claims are labeled "Inverse Condemnation" and are based on Plaintiffs' contention that an unconstitutional taking occurred when Defendant, as trustee of the Fort Independence Indian Reservation, failed to compensate Plaintiffs when it re-drew the boundary line involving Plaintiff's land after performing an "Independent" re-survey of the said land. The fourth

claim[1] is labeled "Writ of Mandate" whereby Plaintiffs seek an Order requiring Defendant to conduct a "Dependent" re-survey.[2]

LEGAL STANDARD

When considering a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a district court is not restricted to the face of the pleadings, but may review any evidence. such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 189 U.S. 1052, 109 S.Ct. 1312 (1989); *see, e.g., Land v. Dollar*, 330 U.S. 731, 735 n.4, 67 S.Ct. 1009, 1011 n.4 (1947) ("when a question of the District Court's jurisdiction is raised ... the court may inquire by affidavits or otherwise, into the facts as they exist"); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment); *see Peter Starr, Prod. Co. v. Twin Continental Films*, 783 F.2d 1440, 1442 (9th Cir. 1986).

CONTENTIONS

Defendant United States' motion to dismiss rests on three grounds. The first is that this Court does nor have jurisdiction to entertain the boundary dispute claim insofar as the United States has not waived its sovereign immunity with respect to Indian lands. With respect to the second and third claims of inverse condemnation, defendant contends that the Court of Federal Claims has exclusive jurisdiction over all claims where a plaintiff seeks claims exceeding $10,000 and in the present action, Plaintiffs seek more than $10,000.

---

[1] The fourth claim is mis-identified in the Third Amended Complaint as the "Sixth Cause of Action.

[2] This is the second motion to dismiss filed by the government in this action.

Lastly, with respect to the writ of mandamus claim, the government contends that this Court lacks authority to issue the writ because it has no independent jurisdiction to hear the matter in which mandamus is sought.

DISCUSSION

I. Boundary Line Issue

With respect to Plaintiffs first claim, Defendant United States' motion to dismiss rests on the contention that it is immune from suit. Specifically, the government cites the Quiet Title Act, 25 U.S.C. § 2409a(a) (hereinafter "QTA"), to support its contention that it is immune from suit.

In an action brought against the United States, the existence of the court's jurisdiction depends upon a waiver, by the government, of its sovereign immunity. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769 (1941). It is well-settled that "[t]he United States does not waive sovereign immunity by implication; any waiver must be unequivocally expressed." *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139, 142 (9th Cir. 1987), *affirmed, California v. United States*, 490 U.S. 920 (1989) *citing Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052-53 (9th Cir. 1985) *rev'd on other grounds*, 474 U.S 9, 106 S.Ct. 289 (1985). Waivers of sovereign immunity are strictly construed. *Id.* at 143. The United States waives its sovereign immunity in variety of ways. The Tucker Act and the Administrative Procedure Act are the two most common waivers by the government waiving its immunity. *Poole v. Rourke*, 779 F.Supp. 1546, 1554 (E.D.Cal. 1991); *Bedoni-Navaho-Hopi Indian Relocation Comm'n*, 854 F.2d 321, 325 (9th Cir. 1988), superseded on other grounds, 878 F.2d 1119 (9th Cir. 1989).

The government contends that it is immune from Plaintiffs' first claim by virtue of the QTA. The Court agrees. As the Court found in the prior motion to dismiss

that was filed by the government, the QTA governs the first claim of Plaintiff's third Amended Complaint. The QTA provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands....

In other words, "[t]he QTA permits the United States to be named as a defendant in lawsuits seeking adjudication of disputed title to land. However, when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Government is immune from suit under the QTA." *Id.* at 143. (*citing United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 476 U.S. 834, 106 S.Ct. 2224, 2229-30 (1986). A boundary dispute between Indian tribes and private parties is governed by the QTA. *Id.*

The government asserts, and Plaintiffs have submitted no evidence to the contrary that the land in question is claimed as trust or restricted Indian land:

> The United States Department of Interior, Bureau of Land Management, has completed and published a survey of the boundaries between the Indian trust lands and the contiguous properties of the plaintiffs. Based on that formal survey, the United States hereby declares and claims its interest in the disputed property on behalf of the Fort Independence Indian Tribe, pursuant to and consistent with the BLM survey of the boundaries in question.

Points and Authorities In Support of Defendant's Motion to Dismiss, pg. 6. In this case, the United States has a colorable claim to the real property in dispute as it is the

trustee of the Indian Reservation. As the government's interest in the disputed land is based on the property's status as Indian Trust land, the QTA does not waive the government's immunity.

Similarly, there is no evidence that the government has expressed or impliedly waived its sovereign immunity in any other way with respect to this action.

Plaintiffs contend that under *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382 (1983), this Court has jurisdiction to settle the boundary dispute. Plaintiffs reliance on *Arizona* is misplaced. In *Metropolitan Water District v. United States*, 830 F.2d 139 (9th Cir. 1987), the Ninth Circuit Court of Appeal reversed a decision from the Southern District of California that found that it had jurisdiction to decide whether the government had the authority to change the boundaries of land between an Indian Reservation and other property owners. The Ninth Circuit held that the district court did not have jurisdiction under the QTA to decide such a dispute. The Ninth Circuit's decision was affirmed by the United States Supreme Court, 490 U.S. 920, 109 S.Ct. 2273 (1989) (affirmed without an opinion).

Accordingly, the Court finds that Defendant United States is immune from suit on Plaintiffs' first claim. Therefore, Defendant's motion to dismiss IS GRANTED with respect to the first claim contained in the Third Amended Complaint.

2. Takings Issue

Plaintiffs' second and third causes of action state claims premised on the Fifth Amendment of the United States Constitution. Specifically, Plaintiffs claim that the government has taken their property without due process and just compensation. For establishing the Court's jurisdiction to hear these claims, Plaintiffs cite 28 U.S.C. § 1346(a)(2), which provides:

> (a) The district courts shall have original jurisdiction with the United States Claims Court

of:

> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress. .

The Government contends that this Court lacks jurisdiction of these claims because Plaintiffs seek more than $10,000. Despite Plaintiffs' representation made in their Third Amended complaint that the land in issue is worth $10,000, Defendant contends that this Court does not have jurisdiction because Plaintiffs are also seeking attorney fees if they prevail on their claims. Defendant cites numerous authority in support of its contention. *See Oliveira v. United States*, 827 F.2d 735, 741-42 (Fed.Cir. 1985); *Sumerling v. Devine*, 769 F.2d 745, 748 (Fed.Cir. 1985); *Graham v. Henegar*, 640 F.2d 732, 736 (5th Cir. 1981); *Lichtenfels v. Orr*, 604 F.Supp. 271, 273-74 (S.D.Ohio 1984), *affirmed*, 878 F.2d 1444 (Fed.Cir. 1989); *Zumerling v. Marsh*, 591 F.Supp. 537, 543 (W.D.Pa. 1984), *affirmed*, 769 F.2d 745 (Fed.Cir. 1985). Although the Court finds that several of the cases Defendant relied on are inapposite to the facts of the present case, the case from the Court of Appeal for the Fifth Circuit, *Graham v. Henegar, supra*, does address the issue before the Court.

In *Graham v. Henegar, supra*, firefighters brought suit against the government to recover overtime compensation, liquidated damages, attorney fees and costs under the Fair Labor Standards Act. The court held that for purposes of claims brought under the Tucker Act, the cost of attorney fees must be included in determining the amount of a Tucker Act claim. *Id.* at 735. In so holding, the court looked to the source of the substantive right upon which the claim was based rather than the language of the Tucker Act itself.[3] The

---

[3] The court noted that the Tucker Act "'merely confers jurisdiction ... whenever the substantive right exists.'" *Id.*

court reasoned that where the source of the substantive right provides for attorney fees over and above the amount of damages, the attorney fee amount should be added to the amount in controversy. *Id.* at 736. Since the source of the firefighters' cause of action specifically provided for an award of attorney fees to a prevailing party, the court concluded that the attorney fees must be included in calculating the amount of the claim. *Id.*

Defendant cites no authority from the Court of Appeal for the Ninth Circuit addressing this issue, nor does an independent search by this Court discover any. However, the Court has found a published case from this district that addresses whether fees should be calculated in the amount sought under the Tucker Act. *See Poole v. Rourke*, 779 F.Supp. 1546 (E.D.Cal. 1991). In *Poole*, a discharged airman brought an action against the Secretary of the Air Force requesting reinstatement. It was undisputed that the amount of the award would greatly exceed the $10,000 threshold of the Tucker Act if the plaintiff prevailed. Thus, on that basis, the government moved to transfer the case to the Court of Claims. The court denied the motion to transfer finding that it had jurisdiction over the action despite the fact that the recovery would be greater than $10,000. *Id.* at 1555-1557.

The *Poole* court looked to the nature of the relief sought in deciding that it had jurisdiction. Since the plaintiff was primarily seeking reinstatement, the court found that the relief sought was equitable-in-nature. However, the court also rejected the government's argument that the $10,000 cap on federal district court jurisdiction under the Tucker Act includes amounts sought as attorney fees. The court expressly rejected *Oliveira v. United States*, the case relied on by the government in the present action for two reasons:

(quoting United States v. Testan, 424 U.S. 392, 398, 96 S.Ct. 948, 953 (1976).)

(1) because it arose under the Federal Court Improvement Act of 1982 and not under the Tucker Act; and (2) because it did not address the relationship between the Equal Access to Justice Act (hereinafter "'EAJA") attorney fees and the $10,000 jurisdictional cap of the Tucker Act. *Id.* at 1558.[4] The court did, however, follow the same test that *Oliveira* did, which looked to see if the statute that supplies the substantive right is separate from the statute that authorizes the award of attorney fees. *Id.* at 1558. The court noted that the EAJA does not provide a substantive right upon which a claim against the United States may be based; rather the substantive right sued upon in the case was an alleged violation of regulations and directives of the Air Force and Department of Defense. Thus, the court concluded that the amount for attorney fees should not be added to the jurisdictional amount.

Similarly, in the present case, Plaintiffs are seeking attorney fees pursuant to a different statute than that they are seeking redress for with respect to their claims. The statute in question, 42 U.S.C. § 4654(c), provides for an award of litigation expenses when a party prevails on a takings claim. Thus. § 4654(c), like EAJA, does not provide a substantive right upon which a claim against the United States may be based. Therefore, if the Court follows *Poole's* reasoning, it should reject Defendant's contention.

The Court is persuaded that *Poole's* reasoning is more sound than that contained in the cases cited by Defendants. Accordingly, the Court follows *Poole's* holding in concluding that attorney fees should not be included in the $10,000 cap of the Tucker Act.

Alternatively, Defendant raises another issue with respect to these two claims. Specifically, Defendant contends that

---

[4] The court also rejected the other cases Defendant cites in this action finding, like this Court, that they were inapposite to the facts before it.

the Court should require Plaintiffs to expressly waive any sums it may receive in excess of $10,000.

At the hearing on the present motion, plaintiffs' counsel indicated to the Court that he believed that the land in question was probably valued in excess of $10,000.[5] Although the Third Amended Complaint states that plaintiffs are seeking only $10,000, the Court cannot ignore the statement made by plaintiffs' counsel at the hearing. Therefore, based on the statements made at the hearing by plaintiffs' counsel, this Court finds that it is required to transfer this action to the Court of Federal Claims.

Therefore, the Clerk of the Court IS DIRECTED to transfer this case to the Court of Federal Claims.

3. Writ of Mandamus

In light of the determination by the Court that this action must be transferred to the Court of Federal Claims, this Court does not have jurisdiction over the writ of mandamus claim because the United States has not waived its sovereign immunity. *See White v. Administrator of General Services Administration*, 343 F.2d 444 (9th Cir. 1965) (the mandamus statute is not a consent to suit by the sovereign); *Smith v. Grimm*, 534 F.2d 1346 (9th Cir. 1976). Thus, without an independent basis for jurisdiction, this Court does not have jurisdiction over the remaining claim.

Moreover, the Court of Federal Claims does not have the authority to order equitable relief.[6] *See generally Standified*

---

[5] The Court is required to look at the amount of monetary relief sought to determine whether jurisdiction is limited to the Court of Federal Claims. McKeel v. Islamic Republic of Iran, 722 F.7d 582, 590 (9th Cir. 1983), cert. Denied, 469 U.S. 880 (1994).

[6] The Court of Federal Claims does have authority to order equitable relief under claims brought pursuant to the Big Tucker Act. *See 28 U.S.C. § 1491(a)(3)* (the Court of Federal Claims can grant equitable relief solely in the case of pre-award contract claims).

v. United States, 32 Fed.Cl. 731, 734-35 (Fed.Cl. 1995).

Insofar as this Court does not have jurisdiction over the remaining writ of mandamus claim, and because the Court of Federal Claims does not have the authority to grant equitable relief, defendant's motion to dismiss as to this claim IS GRANTED.

CONCLUSION

As discussed herein, Defendant's motion to dismiss IS GRANTED IN PART. With respect to the first and fourth claim contained in the Third Amended Complaint, it IS GRANTED. With respect to the second and third claims, the Clerk of the Court IS DIRECTED to transfer this case to the Court of Federal Claims.

IT IS SO ORDERED.

DATED: 13 April , 1998

s/
DENNIS L. BECK
United States Magistrate Judge

PAUL L. SEAVE
United States Attorney
WILLIAM L. SHIPLEY
Assistant U. S. Attorney
3654 Federal Building
1130 "0" Street
Fresno, California 93721
Telephone: (209) 498-7272

ORIGINAL
FILED
DEC 09 1997
CLERK, U.S. DIST. COURT
Eastern District of California

Attorneys for United States of America, as trustee for Fort Independence Indian Reservation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ELLEN MANNATT; et al.,	) CV-92-05293-DLB
Plaintiffs-Appellants,	) MEMORANDUM OF POINTS AND
v.	) AUTHORITIES IN SUPPORT OF MOTION
UNITED STATES OF AMERICA; FORT INDEPENDENCE INDIAN RESERVATION; DANIEL MILLER, SR.; Tribal Chairman; DANIEL MILLER, SR., an Individual, DANIEL MILLER, JR., et al.,	) BY UNITED STATES FOR DISMISSAL BASED ON LACK OF SUBJECT MATTER JURISDICTION) Fed.R.Civ.Proc. 12(d)(1)) Date: January 20, 1998) Time: 9:00 a.m.
Defendants-Appellees.	) Ctrm: Five (5)

The United States respectfully submits this memorandum

of points and authorities in support of its motion to dismiss the Plaintiffs' Third Amended Complaint due to a lack of subject matter jurisdiction of this court to entertain the claims raised by the plaintiffs.

INTRODUCTION

The plaintiffs have filed a third amended complaint for the purposes of litigating a boundary dispute involving Indian trust property and reservation property belonging to the plaintiffs in fee which is within the confines of the Fort Independence Indian reservation. Previously, the plaintiffs have sought to resolve a dispute over the use of water diverted from Oak Creek, which traverses the Fort Independence Reservation and is delivered to the plaintiffs' properties by a series of canals and ditches. After motions to dismiss by various defendants named in the second amended complaint, the plaintiffs abandoned the water rights claims in this action, and filed a similar action in the Superior Court for the State of California. The plaintiffs next filed the third amended complaint alleging causes of action relating to the boundary dispute only.

By this motion the United States seeks to terminate this litigation on the basis that this Article Three district court lacks jurisdiction to entertain the claims of the plaintiffs, nor can it afford them the relief they seek.

The plaintiffs invoke this Court's jurisdiction under 28 U.S.C. § 1346 (United States as Defendant), § 1346(a)(2) (Suit for Damages Not Exceeding $10,000), and § 1331 (Federal Question).

With regard to their first cause of action, 28 U.S.C. § 2409a(a), confers on a federal district court general subject matter jurisdiction over disputes regarding title to property in which the United States claims an interest, however, it excepts from that jurisdiction any disputes regarding title to Indian trust land. As a consequence, this court cannot

entertain the claims raised by the defendant to the extent that they seek to contest boundaries to real property claimed by the United States as Indian trust property.

With regard to the second and third causes of action, the amounts sought by the plaintiff exceed $10,000, therefore exclusive jurisdiction over these causes of action rest with the Court of Federal Claims pursuant to 28 U.S.C. § 1491(a)(1).

With regard to the fourth cause of action, this Court lacks jurisdiction to issue a writ of mandate to the Bureau of Land Management because there is no "clear and unambiguous" ministerial task involved in the relief requested by the plaintiffs. In addition, an extraordinary writ is merely a remedy; the statute authorizing its use is not a waiver of sovereign immunity, and the Court cannot issue a writ to compel an act in a situation where it otherwise lacks jurisdiction over the underlying dispute.

POINTS AND AUTHORITIES

I. THE FIRST CAUSE OF ACTION, FOR QUIET TITLE TO INDIAN LAND BASED ON HISTORICAL BOUNDARIES IS BARRED BY THE LIMITED JURISDICTION OF THIS COURT.

A party may bring an action against the United States only to the extent that the government has waived its sovereign immunity. United States v. Orleans, 425 U.S. 807, 814 (1976). A party bringing such a claim bears the burden of demonstrating an "unequivocal waiver" of that immunity. United States v. Testan, 424 U.S. 392, 399; 96 S. Ct. 948 (1976); Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984)

By enacting the Quiet Title Act, 28 U.S.C. § 2409a(a) ("QTA"), Congress waived, with certain important exceptions, the sovereign immunity of the United States

where it is a party to a dispute over title to a parcel of land. The QTA provides as follows:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands.

Id. (Emphasis added.)

The Indian land exception was added by Congress for the following purpose:

> The federal government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States government. The federal government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the federal government and the Indians without the consent of the Indians.

H.R.Rep. No. 1559, 92d. Cong., 2d Sess., reprinted in 19772 U.S.C.C.A.N. 4556-57.

The United States had never, prior to passage of the QTA, waived its sovereign immunity with respect to suits involving title to land. Block v. North Dakota, 461 U.S. 273, 280, 103 S.Ct. 1811, 1816 (1983). Thus, the QTA is the exclusive means by which adverse claimants can claim the jurisdiction of Article III courts to litigate a claim to title to real property against the United States. Id, 461 U.S. at 286, 103 S.Ct. at 1819. Consequently, when there arises a dispute over land in which the United States claims an interest, the waiver of sovereign immunity must be found, if at all, within

the text of the QTA. State of Alaska v. Babbitt, 38 F.3d 1068, 1073 (9th Cir. 1994)

However, "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the government's immunity." Id, (quoting United States v. Mottaz, 476 U.S. 834, 843, 106 S.Ct. 2224, 2230 (1986)).

Further, "nothing in the [QTA] or its history suggests that the United States was to be put to the burden of establishing title when it has a colorable claim and has chosen to assert its immunity on behalf of the land of which the government declares that it is the trustee for Indians." Id, (emphasis added) (quoting Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987)).

This limitation bars challenges to title even where the facts, if litigated in a district court, might prove the government's position to be incorrect.

> "The QTA's limitations on actions challenging the United States' assertions of title apply without regard to the ultimate validity of those assertions. As this court has previously stated, 'the immunity of the government applies whether the government is right or wrong.'"

Id, 39 F.3d at 1076 (quoting Wildman v. United States, 827 F.2d at 1309). The court went on to conclude:

> "'The very purpose of the doctrine is to prevent judicial examination of the merits of the government's position' ... To the extent that the QTA does allow any inquiry on the merits, that inquiry can extend no further than a determination that the government had some rationale for its claim."

Id.

This doctrine may leave some litigants without a forum within which to contest their claims. However, this consequence is not a basis upon which a district court can

exercise jurisdiction which Congress has not conferred:

> "Congress's unambiguous retention of sovereign immunity against actions affecting trust or restricted Indian lands applies without regard to the availability of alternative means of review. . . . 'Lack of an alternative forum does not automatically prevent dismissal of an action. Sovereign immunity may leave a party with no forum for its claims.'" Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990).

Id, 39 F.3d at 1077.

The United States Department of Interior, Bureau of Land Management, has completed and published a survey of the boundaries between the Indian trust lands and the contiguous properties of the plaintiffs. Based on that formal survey, the United States hereby declares and claims its interest in the disputed property on behalf of the Fort Independence Indian Tribe, pursuant to and consistent with the BLM survey of the boundaries in question. Based on that survey, the United States has a colorable claim to the property in dispute, and is not subject to suit under the Quiet Title Act because the land in question is claimed as trust or restricted Indian land. As a consequence, this court lacks jurisdiction to entertain the claims of the plaintiffs set forth in their first cause of action because the United States has not waived its sovereign immunity and consented to be sued with respect to such claims. This court must, therefore, dismiss the plaintiffs' first cause of action due to a lack of subject matter jurisdiction.

II. THE SECOND AND THIRD CAUSES OF ACTION, FOR JUST COMPENSATION BASED ON A TAKING IN VIOLATION OF THE FIFTH AMENDMENT, ARE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE COURT OF FEDERAL CLAIMS.

The plaintiffs' second and third causes of action state constitutional claims for compensation under the Fifth Amendment, on the basis that the government has taken their property without due process and just compensation. They invoke the jurisdiction of this Court under 28 U.S.C. § 1346(a)(2), which provides:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> * * * *
>
> (2) Any civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, any Act of Congress, or any regulation of an executive department, ...

The plaintiffs attempt to remain within the jurisdictional limits of this Court by seeking only $10,000 in both the second and third causes of action. But at the same time, the plaintiffs seek to reserve their right to seek additional damages by moving the case to the Court of Federal Claims if it is determined that the value of their claims exceed $10,000.

The Court should look to the amount of monetary relief sought to determine whether jurisdiction is limited to the Court of Federal Claims. McKeel v. Islamic Republic of Iran, 722 F.2d 582, 590 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1994).

But, where plaintiffs seek to recover attorneys' fees pursuant to a statutory authorization, such fees must be included in the determination of the amount in controversy. Oliveira v. United States, 827 F.2d 735, 741-42 (Fed. Cir. 1987); Sumerling v. Devine, 769 F.2d 745, 748 (Fed. Cir. 1985); Graham v. Henegar, 640 F.2d 732, 736 (5th Cir. 1981); Polos v. United States, 556 F.2d 903, 906 (8th Cir. 1977); Mille Lac Band of Chppewa Indians v. Minnesota, 853 F.Supp. 1118, 1145 (D.Minn. 1994); Lichtenfels v. Orr, 604 F.Supp. 271, 273-74, (S.D. Ohio 1984), aff'd, 878 F.2d

1444 (Fed Cir. 1989); Zumerling v. Marsh, 591 F.Supp. 537, 543 (W.D.Pa 1984), aff'd. 769 F.2d 745 (Fed Cir. 1985); June v. Secretary of the Navy, 557 F.Supp 144, 147 (M.D.Pa 1982).

In the plaintiffs' prayers for relief as to the second and third causes of action, they seek recovery of costs and attorney fees pursuant to 42 U.S.C. § 4654(c), which provides:

> The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency . . . shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court . . . reimburse the plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Assuming, arguendo, that they were successful on the second and/or third causes of action, the plaintiffs would appear to be entitled to some reasonable recovery of costs and fees. Because the plaintiffs seek recovery of statutory attorneys' fees in addition to monetary compensation of $10,000, the amount in controversy exceeds $10,000 in each count, and the matters falls within the exclusive jurisdiction of the Court of Federal Claims.

The plaintiffs have attempted to anticipate and plead around the issue of the $10,000 jurisdictional limit by stating that if the discovery reveals that their claim exceeds $10,000, they will move the matter to the Court of Federal Claims. But to invoke the jurisdiction of this Court under § 1346(b)(2), it is necessary for the plaintiffs to waive any recovery to any sum in excess of the jurisdictional limit. See Stone v. United States, 683 F.2d 449, 454 (D.C.Cir. 1982)

(A complaint alleging gross back pay claims in excess of $10,000 does not establish an adequate basis for district court jurisdiction unless the complaint waives any claim to net recovery exceeding $10,000.); Lichtenfels v. Orr, 604 F.Supp. 271, 274 (S.D.Ohio 1984) (Plaintiff waived all rights to monetary benefits and attorneys' fees in order to remain within jurisdiction of district court and seek reinstatement to the military and correction of military records to indicate his entitlement to full retirement status.).

To invoke the jurisdiction of this Court, the defendants must include in their complaint a waiver to any sums in excess of $10,000, including any attorneys' fees to which they might be entitled under the statute. If they are unwilling to do so, the Court of Federal Claims has exclusive jurisdiction over this matter.

III. THIS COURT LACKS THE AUTHORITY TO ISSUE A WRIT OF MANDAMUS WHERE IT HAS NO INDEPENDENT JURISDICTION TO HEAR THE MATTER IN WHICH MANDAMUS IS SOUGHT.

In their fourth cause of action, the Plaintiffs request that this Court issue a writ of mandate to the Bureau of Land Management directing it to conduct a "dependent" survey, claiming that the survey completed in June of 1994, was an "independent" survey which was improper and contrary to 42 U.S.C. § 722.[1]

Title 28, U.S.C. § 1361 gives this Court, in the nature of

---

[1] Apparently, a "dependent" survey relies upon previously published corner markers and other landmarks, and is limited to re-tracing the boundary using the best evidence available regarding the earlier information. An "independent" survey attempts to determine where the corner markers and other landmarks should be without respect to prior surveys, and establishes the boundary lines based on the new placements.

the power of mandamus, the authority to compel an officer or employee of the United States, or any agency thereof, to perform a duty owed to the plaintiff. But there are several important limits on this authority.

First, § 1361 is not itself a waiver of sovereign immunity. Smith v. Grimm, 534 F.2d 1344, 1352, n.9 (9th Cir. 1976) (The mandamus statute is not a consent to suit by the sovereign.). Thus, in the absence of some other jurisdictional basis, this Court lacks power to act in this case under mandamus alone.

Second, mandamus writs, as extraordinary remedies, are appropriate only to command an official to perform an act which is a positive command, and so plainly prescribed as to be free from doubt, clear and certain, and where the duty of the officer is ministerial in nature. Id. If the action sought to be directed is discretionary, the writ of mandamus cannot be employed by the Court to compel its performance. The plaintiffs' third amended complaint fails to allege a legal or statutory basis for their claim that the BLM was required to perform a "dependent" survey, and that its obligation in that regard was so "plain, clear, certain, and ministerial" as to afford this Court the authority to so order.

Finally, mandamus is only available when review by other means is unavailable. Kerr v. United States District Court, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124 (1976). Where review of the agency action is available in another court under a different jurisdictional statute, no jurisdiction is available under the mandamus statute. Clark v. Busey, 959 F.2d 808, 812 (9th cir. 1992). Since the plaintiffs' claims can be heard in the Court of Federal Claims, jurisdiction in this court under the mandamus statute is not available.

CONCLUSION

Based on the foregoing, the United States respectfully requests that this court dismiss the complaint filed by the

plaintiffs based on a lack of subject matter jurisdiction.

Dated: 12/9/97

PAUL L. SEAVE
United States Attorney
By s/
WILLIAM L. SHIPLEY
Asst. United States Attorney

Kirk K. Livermont
Attorney at Law
251 North Edwards Street, P.O. Box 6
Independence, California 93526
(760) 878-2401
California State Bar No. 135416

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ELLEN MANNATT; ROBERT MANNATT; and BRUCE MATHER, Plaintiffs,	) CASE NO. CV-92-05293-DLB
v.	) THIRD AMENDED COMPLAINT TO ESTABLISH BOUNDARY LINE; INVERSE CONDEMNATION; AND WRIT OF MANDATE
UNITED STATES OF AMERICA; FORT INDEPENDENCE INDIAN RESERVATION; DANIEL MILLER, SR., Tribal Chairman; DANIEL MILLER, SR,. an Individual; DANIEL MILLER, JR.; ALLEN WILDER; WILLARD L. MATHER; JACQUETTA R. MATHER; LONA BURKHART; EUGENE C.BURKHART; LOUISE A WALKER; MARIE E. HURLBUT; CARL HERMAN WALTERS; NELLIE E. LONNOAGIN; and OWENS VALLEY UNIFIED SCHOOL DISTRICT; Defendants.	)

1. Jurisdiction of this Court is invoked under the following statutes:

a. 28 U.S.C. Section 1346;

b. 28 U.S.C. Section 1346(a)(2) {Tucker Act}; and

c. 28 U.S.C. Section 1341 {Federal Question}

FIRST CAUSE OF ACTION

{Determination of Boundary Line}

2. Plaintiffs ELLEN MANNATT, ROBERT MANNATT and BRUCE MATHER, are competent adults who reside in Inyo County.

3. FORT INDEPENDENCE INDIAN RESERVATION is an Indian Reservation created by two Executive orders dated October 28, 1915, and April 29, 1916, organized under the laws of the United States of America. Said Executive Orders made the withdrawals for the reservation "subject to any valid existing rights of any person or persons."

4. The UNITED STATES OF AMERICA is a public entity.

5. The UNITED STATES OF AMERICA owns the real property which comprises the FORT INDEPENDENCE INDIAN RESERVATION as trustee for said Reservation.

6. Defendant DANIEL MILLER, SR., was chairman of Defendant FORT INDEPENDENCE INDIAN RESERVATION when the litigation was commenced.

7. Defendant DANIEL MILLER, JR., was the chairman of the FORT INDEPENDENCE INDIAN RESERVATION Water Committee when this litigation was commenced.

8. Defendants DANIEL MILLER, SR., DANIEL MILLER, JR., and ALLEN WILDER are each competent adults and residents of Inyo County.

9. The actions complained of herein and undertaken by Defendant DANIEL MILLER, SR., DANIEL MILLER, JR. and ALLEN WILDER at the direction of and for the benefit of the FORT INDEPENDENCE INDIAN RESERVATION.

10. Defendant OWENS VALLEY UNIFIED SCHOOL

DISTRICT is a public entity.

11. The following described real property which is located in the unincorporated area of the County of Inyo, State of California is the subject of this action:

> A Parcel of land in the West half of Lot 2, of the Northwest quarter of Section 6, Township 13 South, Range 35 East, M.D.M., formerly occupied by the Milton School in Inyo County, State of California, and more particularly described as follows:
>
> COMMENCING at a buried iron pipe on the South Line of Lot 2, in the County Road, said pipe being marked U.S.I.S. 1952 L 1 and L 2, and running thence along the South side of said Lot 2, South 89 degrees 33' West 38.07 feet to an iron pipe on the West side of the County Road, the TRUE POINT OF BEGINNING; thence along the West side of the County Road, North 0 degrees 19' East 100 feet to an iron pipe; thence South 89 degrees 33' West, parallel with the South side of said Lot 2, 250 feet to an iron pipe; thence South 0 degrees 19' West, parallel with the West side of the County Road, 100 feet to an iron pipe on the South side of said Lot 2; thence along the South side of said Lot 2, North 89 degrees 33' East, 250 feet to the TRUE POINT OF BEGINNING.

12. Said real property was the subject of a quiet title action filed in Inyo County Superior Court on December 1, 1960, Case Number 6,495. In said case the Court issued a Decree Quieting Title to said real property on January 9, 1963 in which Owens Valley Unified School District was found to be the owner of said property. Plaintiffs request this

Court take judicial notice of said Decree.

13. On January 10, 1992, a claim was filed with Owens Valley Unified School District informing it of this action. Owens Valley Unified School District rejected said claim on January 14, 1991, and disavowed any ownership interest in the real property which is the subject of this suit.

14. Plaintiffs ELLEN MANNATT and BRUCE MATHER are now, and at all times mentioned in this Complaint were, the owners of and in the possession of and entitled to the possession of real property in Inyo County, State of California, legally described in paragraph 11.

15. Defendants WILLARD L. MATHER, JACQUETTA R. MATHER, LONA BURKHART, EUGENE C. BURKHART, LOUISE A WALKER, MARIE E. HURLBUT, CARL HERMAN WALTERS, NELLIE E. LONNOAGIN, and OWENS VALLEY UNIFIED SCHOOL DISTRICT, at one time held an interest in said real property described in paragraph 11; they no longer hold said interest because for valuable consideration they deeded said property to successors in interest culminating with Plaintiffs, ELLEN MANNATT and BRUCE MATHER.

16. Defendant UNITED STATES OF AMERICA is now, and at all times mentioned in this Complaint were, the owners of and in the possession of and entitled to the possession of real property located in Inyo County, State of California, as trustee a certain lot in the FORT INDEPENDENCE INDIAN RESERVATION legally described as follows:

> Lot 10 of Government Lot 1, T13S, R35E. M.D.B&M as recorded in the official records of the County Recorder of Inyo County.

17. Defendant DANIEL MILLER, JR. has a possessory interest in Reservation allotments 8A and 8B which are wholly contained in the real property described in paragraph

16. Said property is identified in Exhibit 2, Allotment & Tribal Tract Boundaries.

18. The above-described properties of Plaintiffs and Defendants adjoin each other at the south boundary of Plaintiffs' land and the north boundary of Defendant United States of America land as described in paragraph 11 and Defendant DANIEL MILLER'S allotments as described in paragraph 17.

19. Defendant DANIEL MILLER, JR. claims for FORT INDEPENDENCE INDIAN RESERVATION an interest and estate in Plaintiffs' above-described property, or a portion of it, by disputing and denying that the true and correct boundary line between the respective properties of Plaintiffs and Defendants runs as follows: Along an old fence line with 30 to 60 foot trees growing through it which run immediately adjacent to and south of one of the channels of Oak Creek. Plaintiffs are informed, believe, and therefore allege that Defendant DANIEL MILLER, JR. contends that the true and correct boundary line between the respective properties of Plaintiffs and Defendants runs as follows: North of the old fence line without identification of a specific point or landmark. The claim of Defendants is without any right whatsoever, and Defendants have no right, estate, title, or interest in the above-described property of Plaintiffs, or any part of it.

20. Said boundary line as alleged by Plaintiffs has been the historical boundary line which existed prior to the reservation by Executive Order and honored by each previous owner of Plaintiffs real property and by each previous holder of Defendant DANIEL MILLER, JR.'s allotment.

21. On December 18, 1991, Defendant, DANIEL MILLER, JR., using certified mail, mailed a letter to Defendants, WILLARD MATHER and JACQUETTA MATHER, indicating that he intended to construct a fence upon Plaintiffs property.

22. Defendant, DANIEL MILLER, JR. crossed the contested boundary line, removed a portion of the existing fence, destroyed an irrigation system on said property, caused damage to said property, and executed a new fence north of the historical boundary.

23. Unless Defendants are enjoined from asserting the above-described adverse claim to Plaintiffs' property, irreparable harm, damage, and injury will follow and be done to Plaintiffs. Assertion of the adverse claim by Defendants tends to greatly depreciate the value of Plaintiffs' property and Plaintiff have no adequate remedy at law, or otherwise, for the harm and damage threatened to be done by Defendants, for the reason that Plaintiffs cannot adequately be compensated for their injuries in an action at law for damages, since the amount of damages Plaintiffs will sustain as a result of the acts of the Defendants are not susceptible of accurate computation.

SECOND CAUSE OF ACTION
{Inverse Condemnation}

24. Plaintiffs ELLEN MANNATT and BRUCE MATHER refer to Paragraph 1 through 5, inclusive; 11, 14, 16 and 22 of their First Cause of Action and by this reference incorporate them in this Cause of Action as if fully set out.

25. This is an inverse condemnation action arising out of an unconstitutional taking by Defendant UNITED STATES without formal condemnation or payment of compensation of an interest in plaintiffs', ELLEN MANNATT and BRUCE MATHER, property. The amount of plaintiffs' claim for the taking is Ten Thousand Dollars ($10,000.00) and jurisdiction is invoked under the Tucker Act, Title 28, Section 1346(a)(2) of the United States Code. Plaintiffs' claim is based on the prohibition of the Fifth Amendment of the United States Constitution against the taking of private property without just compensation. In the event that damages sustained by plaintiffs in this taking exceed the sum of Ten Thousand

Dollars ($10,000.00), plaintiffs reserve the right to withdraw this Cause of Action from the overall Complaint when the other Causes of Action are litigated to completion and file a claim for this Cause of Action in a Court of Claims.

26. Plaintiffs, ELLEN MANNATT and BRUCE MATHER, are individuals residing in Inyo County, State of California. Since December 30, 1987, plaintiffs have owned real property located in Inyo County as described in Paragraph 11 above.

27. As part of litigation on the First Amended Complaint in this action for the First Cause of Action, the Bureau of Land Management a part of the Department of the Interior conducted an "Independent" re-survey of the land which is subject to this litigation. As a result of said re-survey the boundary line between the real property described in the First Cause of Action was moved north by approximately fifteen feet, reducing the overall area of plaintiffs' real property and eliminated direct access to water from Oak Creek.

28. Plaintiffs ELLEN MANNATT and BRUCE MATHER, claim to said real property is derived from a land patent issued by Defendant UNITED STATES in 1885.

29. The UNITED STATES' claim to ownership to real property and the purpose for this re-survey was a result of the creation of FORT INDEPENDENCE INDIAN RESERVATION in 1915 and 1916, respectively, by two separate Executive Orders issued by the President of the United States as described in paragraph 3, above. The UNITED STATES contends that survey is not impeachable in any court therefore the boundary lines are not subject to litigation and consequently there has been a taking of property which was reserved for plaintiffs under said Executive Order creating said Reservation and as a result of original land patent, without due process of law.

30. Plaintiffs ELLEN MANNATT and BRUCE MATHER, contend that the re-survey by the Bureau of Land Management violated Sections 43 U.S.C. 772 and 43 U.S.C.

773 in that "no such re-survey or re-tracement shall be so executed as to impair the bonifide rights or claims of any claimant, countrymen, or owner of lands effected by such re-survey or re-tracement." In performing a re-survey, the Bureau of Land Management conducted an "Independent" re-survey which is independent of and without reference to the corners to the original survey. The Bureau of Land Management should have conducted a "Dependent" re-survey which is a re-tracement and re-establishment of the lines of the original survey and their true original position according to the best of available evidence of the positions in the original corners. By conducting said "Independent" re-survey the Bureau of Land Management has impaired the property rights of the plaintiffs herein.

31. As a result of the UNITED STATES' unauthorized taking of an interest in plaintiffs' property, a right has accrued to plaintiffs for recovery from defendants of just compensation for the interest taken from the date that the taking was effective which was January, 1992, when the members of the Fort Independence Indian Reservation under color of law exerted their authority and control over said real property.

32. The sum claim by Plaintiffs, ELLEN MANNATT and BRUCE MATHER, as just compensation for the taking of the interest in their land is Ten Thousand Dollars ($10,000.00). That sum being the difference between a fair market value of plaintiffs' land before and immediately after UNITED STATES' taking interest as aforesaid. In the event, through discovery said value is greater than Ten Thousand Dollars ($10,000.00), plaintiffs reserve the right to withdraw this Cause of Action and file it in the Court of Claims once the litigation in the remaining Causes of this Action is completed.

THIRD CAUSE OF ACTION
{Inverse Condemnation}

33. Plaintiffs ELLEN MANNATT and ROBERT MANNATT refer to Paragraph 1 through 5, inclusive, of their First Cause of Action and by this reference incorporate them in this Cause of Action as if fully set out.

34. Plaintiffs ELLEN MANNATT and ROBERT MANNATT own two adjacent lots (hereinafter MANNATT Lots) legally described as:

> Parcels 1 and 2 of Parcel Map #213, in the County of Inyo, State of California, as per Parcel Map recorded in Book 2 Page 99 of Parcel Maps in the office of the County Recorder of said County.

35. Said MANNATT Lots are contained in the West half of Lot 1 in the Northwest Quarter of Section 6, Township 13 South, Range 35 East, M.D.B.& M.

36. This is an inverse condemnation action arising out of an unconstitutional taking by Defendant UNITED STATES without formal condemnation or payment of compensation of an interest in plaintiffs', ELLEN MANNATT and ROBERT MANNATT, property. The amount of plaintiffs' claim for the taking is Ten Thousand Dollars ($10,000.00) and jurisdiction is invoked under the Tucker Act, Title 28, Section 1346(a)(2) of the United States Code. Plaintiffs' claim is based on the prohibition of the Fifth Amendment of the United States Constitution against the taking of private property without just compensation. In the event that damages sustained by plaintiffs in this taking exceed the sum of Ten Thousand Dollars ($10,000.00), plaintiffs reserve the right to withdraw this Cause of Action from the overall Complaint when the other Causes of Action are litigated to completion and file a claim for this Cause of Action in a Court of Claims.

37. Plaintiffs ELLEN MANNATT and ROBERT MANNATT, are individuals residing in Inyo County, State of California. Since July 13, 1989, for one parcel as

described in Paragraph 34 and since June 5, 1991, for the other parcel described in Paragraph 34, plaintiffs have owned real property located in Inyo County.

38. As part of litigation on the First Amended Complaint in this action for the First Causes of Action, the Bureau of Land Management a part of the Department of the Interior conducted an "Independent" re-survey of the land which is subject to this litigation. As a result of said re-survey, the boundary lines of the real property described in Paragraph 34 were shifted west by approximately ten feet.

39. Plaintiffs ELLEN MANNATT and ROBERT MANNATT claim to said real property is derived from a land patents issued by Defendant UNITED STATES.

40. The UNITED STATES' claim to ownership to real property and the purpose for this re-survey was a result of the creation of FORT INDEPENDENCE INDIAN RESERVATION in 1915 and 1916, respectively, by two separate Executive Orders issued by the President of the United States as described in paragraph 3, above. The UNITED STATES contends that survey is not impeachable in any court therefore the boundary lines are not subject to litigation and consequently there has been a taking of property which was reserved for plaintiffs under said Executive Order creating said Reservation and as a result of original land patent, without due process of law.

41. Plaintiffs, ELLEN MANNATT and ROBERT MANNATT, contend that the re-survey by the Bureau of Land Management violated Sections 43 U.S.C. 772 and 43 U.S.C. 773 in that "no such re-survey or re-tracement shall be so executed as to impair the bonifide rights or claims of any claimant, countrymen, or owner of lands effected by such re-survey or re-tracement." In performing a re-survey, the Bureau of Land Management conducted an "Independent" re-survey which is independent of and without reference to the corners to the original survey. The Bureau of Land Management should have conducted a "Dependent" re-

survey which is a re-tracement and re-establishment of the lines of the original survey and their true original position according to the best of available evidence of the positions in the original corners. By conducting said "Independent" re-survey the Bureau of Land Management has impaired the property rights of the plaintiffs herein.

42. As a result of the UNITED STATES' unauthorized taking of an interest in plaintiffs' property, a right has accrued to plaintiffs for recovery from defendants of just compensation for the interest taken from the date that the taking was effective which was June 1994, when preliminary corner markers were established.

43. The sum claim by Plaintiffs, ELLEN MANNATT and ROBERT MANNATT, as just compensation for the taking of the interest in their land is Ten Thousand Dollars ($10,000.00). That sum being the difference between a fair market value of plaintiffs' land before and immediately after UNITED STATES' taking interest as aforesaid. In the event, through discovery said value is greater than Ten Thousand Dollars ($10,000.00), plaintiffs reserve the right to withdraw this Cause of Action and file it in the Court of Claims once the litigation in the remaining Causes of this Action is completed.

44. The is a structure that was once contained wholly on FORT INDEPENDENCE INDIAN RESERVATION which now occupies part of Plaintiffs' ELLEN MANNATT and ROBERT MANNATT, land. Which structure, Plaintiffs demand to have removed.

SIXTH CAUSE OF ACTION
{Writ of Mandate}

45. All Plaintiffs refer to Paragraph 1 through 5, inclusive, of their First Cause of Action and by this reference incorporate them in this Cause of Action as if fully set out.

46. As part of litigation on the First Amended Complaint in this action for the First Cause of Action, the Bureau of

Land Management a part of the Department of the Interior conducted an "Independent" re-survey of the land which is subject to this litigation.

47. The UNITED STATES' claim to ownership to real property and the purpose for this re-survey was a result of the creation of FORT INDEPENDENCE INDIAN RESERVATION in 1915 and 1916, respectively, by two separate Executive Orders issued by the President of the United States as described in paragraph 3, above.

48. Plaintiffs contend that the re-survey by the Bureau of Land Management violated Sections 43 U.S.C. 772 and 43 U.S.C. 773 in that "no such re-survey or re-tracement shall be so executed as to impair the bonifide rights or claims of any claimant, countrymen, or owner of lands effected by such re-survey or re-tracement." In performing a re-survey, the Bureau of Land Management conducted an "Independent" re-survey which is independent of and without reference to the corners to the original survey. The Bureau of Land Management should have conducted a "Dependent" re-survey which is a re-tracement and re-establishment of the lines of the original survey and their true original position according to the best of available evidence of the positions in the original corners. By conducting said "Independent" re-survey the Bureau of Land Management has impaired the property rights of the plaintiffs herein.

49. The UNITED STATES should be ordered to perform a re-survey of the affected land in accordance with statues, regulations and established procedures.

WHEREFORE, Plaintiffs prays judgment that;

FIRST CAUSE OF ACTION

1. Defendants be required to set forth the right, nature, and virtue of their claim to plaintiffs' above-described real property and that all adverse claims of defendants in the property be determined by a decree of this Court;

2. The Court determine the true and correct location of the boundary line between the above-described properties of plaintiffs and defendants.

3. Plaintiffs' title in and to the above-described property be quieted and that it be adjudged that defendants have no right, title, estate, lien, or interest in or to the land of plaintiffs, or any part of it.

4. Defendants be permanently enjoined and restrained from asserting any estate, right, title, or interest in the above-described property of plaintiffs, or any part of it, adverse to plaintiff;

5. Defendants FORT INDEPENDENCE INDIAN RESERVATION, DANIEL MILLER, SR., DANIEL MILLER, JR., ALLEN WILDER and their employees, agents, and any other person acting under their direction be enjoined from altering any portion of the land described herein, which is north of the boundary line alleged by Plaintiffs in paragraph 14 to be the true boundary line, to include, but not limited to, removal of fences, removal of trees, clearing of land, erection of fences, and altering the channel of Oak Creek which runs along said boundary line during the pendency of this action.

6. For general damages.

SECOND CAUSE OF ACTION

7. For judgment for plaintiffs ELLEN MANNATT and BRUCE MATHER against the United States in the sum of Ten Thousand Dollars ($10,000.00);

8. For interest at the lawful rate from the date of taking an interest in plaintiffs' property being January, 1992, until the judgment is paid;

9. Full recovery of plaintiffs' costs and attorney fees recoverable under Provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, specifically Title 42, section 4654(c), of the United States Code; and

THIRD CAUSE OF ACTION

10. For judgment for plaintiffs ELLEN MANNATT and ROBERT MANNATT against the United States in the sum of Ten Thousand Dollars ($10,000.00);

11. For interest at the lawful rate from the date of taking an interest in plaintiffs' property being June 1994, until the judgment is paid;

12. Full recovery of plaintiffs' costs and attorney fees recoverable under Provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, specifically Title 42, section 4654(c), of the United States Code; and

FOURTH CAUSE OF ACTION

13. A Writ of Mandate be issued to the Bureau of Land Management directing it to perform a "Dependent" re-survey in conformance with statutes, regulations and established procedures.

FOR ALL CAUSES OF ACTION

14. For costs; and,

15. For such other and further relief as the Court may deem proper.

Dated: November 19, 1999

s/

Kirk K. Livermont
Attorney for Plaintiffs

Executive Order

It is hereby ordered that the following described lands, containing 320.40 acres, in California, be and the same are hereby, permanently withdrawn from all forms of settlement, location, entry, sale, or other disposition, and reserved for the Camp or Fort Independence Indians entitled to allotments thereon:

Sec. 1, T. 13 S., R. 34 E., M. D. M.

Lots 18 to 35, both inclusive, designated on plat of survey approved May 3, 1913, or original Lot 1 in NE ¼;

Lots 11 to 17, both inclusive, designated on plat of survey approved May 3, 1913, or W ½ of original Lot 2 in NE ¼;

Lots 7 to 10, both inclusive, designated on plat of survey approved May 3, 1913, or W ½ of original Lot 3 in NE ¼;

E ½ of Lot 1 in NW ¼, designated on plat of survey approved November 12, 1856;

Lot 2 in NW ¼, designated on plat of survey approved November 12, 1856;

Sec. 6, T. 13 S., R. 35 E., M. D. M.

Lots 7 to 15, both inclusive, designated on plat of survey approved May 3, 1913, or W ½ of original Lot 1 in the NW ¼.

This withdrawal is made subject to any valid existing rights of any person or persons.

WOODROW WILSON

The White House,
28 October, 1915

Executive Order

It is hereby ordered that the following described tract containing 40 acres in California be, and the same is hereby, permanently withdrawn from all forms of settlement, location, entry, sale, or other disposition, and reserved as an addition to the reservation for the Camp or Fort Independence Indians set apart by executive Order No. 2264, dated October 28, 1915:

W ½ of Lot 4 of the NE ¼ of Sec. 1, T. 13 S., R. 34 E. M. D. M.

This withdrawal is made subject to any valid existing rights of any person or persons.

WOODROW WILSON

The White House,
29 April, 1916

[No. 2375.]

28 U.S.C. § 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the

civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on

which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(*l*) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub.L. 92-562, § 3(a), Oct 25, 1972, 86 Stat. 1176, and amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-598, Nov. 4, 1986,100 Stat. 3351.)

44 Stat at L 1347, Chap. 299

An Act To authorize oil and gas mining leases upon unallotted lands within Executive order Indian reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil or gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (Forty-third Statutes, page 244).

SEC. 2. That the proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

SEC. 3. That taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a

lien or charge of any kind against the land or other property of such Indians.

SEC. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920, to prospect for oil and gas upon lands within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefits of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period of two years from the date this Act takes effect, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such

application, he shall be entitled to a lease for one-fourth of the land embraced in the application: *Provided*, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount of value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: *Provided further*, That the Secretary of the Interior shall have the right to reject any or all bids.

Approved, March 3, 1927.